

Quality Food Management, Inc. and Civil Service Employees' Association, Inc., Local 1000, AFSCME, AFL-CIO. Cases 2-CA-29144, 2-CA-29301, and 2-CA-29487

March 17, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On December 10, 1998, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Quality Food Management, Inc., Latham, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Jolynne D. Miller, Esq. and Mindy Landow, Esq., for the General Counsel.

Kirk M. Lewis, Esq. (DeGraff, Foy, Holt-Harris, & Kunz), of Albany, New York, for the Respondent.

William A. Herbert, Esq., of Albany, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in New York, New York, on March 23 and April 20, 1998. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, refused to meet and bargain with the Union, and that it unilaterally implemented a new disciplinary policy and unlawfully discharged employee Melissa Paulson pursuant to that policy. The Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent on June 25, 1998, I make the following¹

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ The record is corrected so that at p. 138, LL. 6, and p. 141, LL. 12, the correct case name is *Bannon Mills*; at p. 193, LL. 2, the last word is "disparate"; wherever the record reads "Airmark" the name should be "Aramark"; and on p. 146, LL. 18 and p. 147, LL. 3, the word "advance" should read "abeyance."

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Latham, New York, is engaged in the provision of food service to the Peekskill School District from which it derives an annual income in excess of \$50,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Civil Service Employees' Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

For a number of years the cafeterias in the Peekskill School District had been run by a company named Aramark. In 1995, the School District solicited bid proposals for the food service contract, and eventually Respondent Quality Food Management, Inc. was named as the successful bidder. Aramark's employees in the Peekskill District had been represented by Local 1000. None of Respondent's employees had been represented by a union before it took over the Peekskill District contract.

James V. Bigley, the president of Quality Food Management, testified that he learned that the Peekskill employees were represented by the Union when he received the bid specifications. These specifications, prepared by the Peekskill School District, included a labor schedule listing the number of employees currently working at each school in the district, their hours of work, rates of pay, sick leave, and holiday entitlements. The specifications noted that the pay rate "includes the .30 per hour rate increase described in the collective bargaining agreement." The specifications required that the food service provider "should be fully knowledgeable of the requirements of the agreement with the Civil Service Employees Association Inc. Local 1000 that is included in this bid." Bigley testified that the specifications contained a copy of the collective-bargaining agreement between Aramark and Local 1000.

The bid prepared by Respondent included a proposed transition plan that stated, "We will ensure all of the employees that the continuance of their jobs is assured" and "Quality Food Management, Inc. will adhere to the labor schedule put in the bid specifications, Schedule E." As part of its bid proposal, Respondent included a copy of its employee handbook.²

Bigley testified that Respondent learned that it would formally be awarded the contract by the School Board at a meeting to be held on July 27, 1995. On that day, Bigley and two other managers of Respondent met for lunch in a restaurant with Evan Echenthal, a labor relations specialist for Local 1000. That afternoon, they conducted a meeting with the food service employees, and following this they attended the School Board meeting.

It is not disputed that the Union represents the following employees of Respondent in a unit appropriate for the purposes of collective bargaining:

All cafeteria employees employed at the Peekskill School District, excluding all office clerical employees, casual substitute employees, professional employees, guards and supervi-

² The handbook is a 21-page booklet.

sors as defined in the Act, as amended, and excluding all other employees.

B. Respondent Commences Operations

Bigley testified that when he met Echenthal he was accompanied by Respondent's regional manager, Trent Allen, and its district manager, William Meirhead. At the meeting, Bigley acknowledged to Echenthal that Respondent had an obligation to negotiate with the Union. He stated that Respondent was not bound by the existing collective-bargaining agreement but that "we should start there" and he raised some issues relating to the existing agreement. Bigley testified that this was all that was discussed at the meeting. Later, in response to a leading question from counsel for Respondent whether there had been any discussion about the employee handbook at the lunch meeting, Bigley said that either at the lunch meeting or at the meeting in the school he "indicated that we would be passing that out. I don't know exactly when that was."

Bigley testified that he and his managers met with the food service employees in the auditorium of the School District administration building. Bigley conducted the meeting. Each employee was given the employee handbook, a W-4 form, an I-9 form, and the "rules and regulations." In referring to rules and regulations, Bigley meant a three-page document. The first page of this document is entitled "employee rules listing" and it provides that "violation of any of these rules will lead to serious disciplinary action or dismissal." The rules include failure to report to work without calling, excessive lateness, use of drugs or alcohol, theft, gambling, and the like. The second page is entitled, "safety rules and regulations" and it provides safety rules adapted to kitchen workers. The third page has a section entitled, "Sanitation" which emphasizes safe handling of food and utensils and a section entitled, "General Information" which prohibits eating in work areas, prohibits alcohol and drug use, discourages tardiness and language in poor taste, and deals with a host of incidental matters relating to the work place. At the bottom of each of the three pages of the rules and regulations is a line for an employee signature and the date. The first page of this document also contains a line for a witness signature. Apparently, each employee received a copy of the three-page rules and regulations and signed another copy which was retained by Respondent in each employee's personnel file.

Regional Manager Trent Allen testified that he attended the July 27 meeting in the restaurant and the employee meeting held thereafter. Allen stated that at the employee meeting he himself handed out the employee handbook. Allen heard Bigley tell the employees that the handbook would answer their questions about funeral leave.

Echenthal testified that as an agent of CSEA he represented the employees of the Peekskill School District. Echenthal recalled meeting Bigley and the two other managers at a restaurant, but he placed the meeting in August. According to Echenthal, Bigley said that Respondent would hire the former Aramark employees and take on a readymade work force. Echenthal and Bigley discussed the previous collective-bargaining agreement with Aramark, and Bigley stated that he wanted to make two changes. Bigley said that he wanted to extend the agreement by 2 years with any wage increases tied to the Consumer Price Index and he wanted to extend the probationary period. Echenthal replied that for employees earning from \$6 to \$7 per hour this would only amount to a 17- or 18-

cent hourly increase, a very small figure compared to the 30-cent raises of the last contract.

Echenthal testified that he attended Respondent's orientation meeting with the employees. He recalled that Bigley welcomed the employees to the "Quality Food Management Family," told them a bit about the company and gave out W-4 forms and other documents. Echenthal, who reviewed all the documents that Respondent distributed to employees at the orientation, recalled that he objected to one document handed out by Respondent because it asked the employees to sign an authorization for carrying out a criminal background check. Bigley withdrew the document after Echenthal told him that it was a problem because he was dealing with long-term employees. Echenthal was sure that the handbook was not mentioned by Bigley at the restaurant meeting and he was sure that the handbook was not mentioned at the employee orientation meeting later that day. Echenthal testified that after employee Melissa Paulson was fired in March 1996 he learned that Respondent had distributed its employee handbook to the food service workers, but he did not know exactly when it was distributed.

Michael A. Richardson, who was the CSEA Director of Private Sector Affairs until November 1996, testified that he had first seen Respondent's employee handbook when Echenthal showed him a copy of the bid documents in early November 1995. Soon after this, when Richardson began preparing a draft of the collective-bargaining agreement between Local 1000 and Respondent, he asked Respondent's attorney, Glen Doherty, to provide him with a copy of any employee manuals that Respondent had produced. Richardson received a copy of the handbook from Doherty after the first week of November 1995; he incorporated language from the employee handbook in his working draft of a proposed agreement to the extent that the language was acceptable to the Union.

Melissa Paulson had worked for Aramark for about 10 years, beginning as a food service worker and eventually being promoted to assistant cook at the Uriah Hill School. Paulson attended an orientation meeting conducted by Quality Food Management in the high school kitchen. At this meeting Paulson learned that the head cook at Uriah Hill was retiring, and Bigley informed her that she would be appointed head cook. Paulson filled out various forms including the three-page rules and regulations which are signed, dated and witnessed on August 15, 1995. Paulson was sure that she did not receive a handbook with the forms. Paulson testified that she received copies of the handbook in February 1996, when she was told to give one to each employee. Before February 1996, Paulson had not been aware of the handbook.

Roland Laffert, the Peekskill District food service director, was Paulson's immediate supervisor. Laffert testified that he and Bigley hired Paulson at a meeting held with the employees in the third week of August 1995. Laffert also testified that a copy of the handbook was given to the employees he hired after September 4. Another copy with a different cover was distributed to employees after school had opened. Laffert stated that he did not attend the initial employee meeting conducted by Respondent on July 27 and he was not present when the list of serious infractions and safety rules was given to employees.

C. Negotiations with the Union

Echenthal testified that after the first meeting with Bigley in the restaurant in the summer of 1995 he and Bigley discussed terms for a collective-bargaining contract. Agreement had been

reached on all but three items which were listed in a letter that Echenthal sent to Bigley on October 25, 1995. The outstanding issues were:

1. Two-year extension of the current ARAMARK-CSEA contract.
2. Extension of the probationary period.
3. Payroll deduction of union dues.

Echenthal's letter asked Respondent to continue negotiations. When the Union received no response, CSEA Director Richardson telephoned Bigley and, in November 1995, the two discussed a collective-bargaining agreement between Respondent and Local 1000. Bigley told Richardson that he did not want to continue the Aramark contract and that he did not want a 5-year agreement.

Based on his conversation with Bigley, Richardson drafted a new agreement and he transmitted the Union's proposal to Doherty on January 4, 1996. A negotiating session was scheduled for February 13, 1996. Echenthal was present for the negotiations along with an employee negotiating committee. When Bigley saw that one of the members of the committee was Local 1000 President Martha Cadoret, a person who had been discharged by Respondent, he said that he would not negotiate as long as an employee who had been terminated was present and he walked out.³ Echenthal tried to persuade Bigley to stay, telling him that Cadoret was the president and that the Union could chose its own committee, but Bigley would not stay.

After February 13, Richardson spoke to Doherty and to Bigley asking each of them to continue the negotiations. When Bigley continued to refuse to bargain with Cadoret present, Richardson said that the Union would come to the table with different representatives from the bargaining unit. Richardson denied that he agreed to suspend negotiations until the pending unfair labor practice charge over Cadoret's discharge was resolved by the Regional Office.

Bigley testified that Richardson told him that the Union wanted to keep negotiating; however, Respondent refused as long as Cadoret was involved. Bigley stated, "At that point, we agreed, at least I interpreted it as an agreement, that they were going to let the NLRB decide on whether or not this individual could nor could not be part of a negotiating team. I interpreted that as we will wait for that result and then we'll go forward."

On February 20, 1996, the Union filed a charge alleging that Respondent had refused to bargain.

After the Union elected new officers in November 1996, Echenthal wrote to Bigley informing him of the change and asking him to continue negotiating. No negotiations had been held since the aborted meeting of February 13, 1996. The parties scheduled a meeting for December 13, and an agreement was concluded that day.

The collective-bargaining agreement between Respondent and the Union for the period March 31, 1997, to June 30, 2000, was signed on March 31, 1997. It has the same management-rights clause as the Aramark contract. The Quality Food Management employee handbook was never the subject of negotiations between the Union and Respondent.

D. Discharge of Melissa Paulson

Paulson testified that she was given three reprimands by Food Service Director Laffert: A written reprimand dated Feb-

ruary 6, 1996, cites Paulson for failure to comply with Respondent's uniform policy in that she was not wearing a Quality Food Management smock; a reprimand dated March 22 cites the fact that the kitchen ran out of pizza and a parent complained that her child was given a sandwich instead; and a reprimand dated March 28 states that the chicken parmigiana was made with American cheese instead of the required mozzarella cheese and that too many portions had been left over and could not be reused.⁴ Laffert testified that he discharged Paulson on March 28, 1996, "since it was her third written reprimand." The written reprimand states, "This being 3rd written reprimand, employee was terminated from QFM employment." Respondent's handbook contains a progressive discipline scheme and provides that after a third infraction management "may decide that continued discipline problems, disregard for the rules and policies indicates a non-willingness to work for QFM and therefore must be terminated from employment." [Sic.] The handbook also describes serious and extreme actions that will excuse adherence to "the three step process."

The General Counsel and the Union urge that the disciplinary procedures that should have been applied are those that were in place under the CSEA-Aramark contract. Echenthal testified that those procedures were based on the management rights clause, the seniority clause, and the arbitration provision. The CSEA-Aramark contract provided:

Article 5—Management Rights

The management of the Unit and the direction of the employees, including the right to . . . discharge for proper cause . . . is vested exclusively in the Company

Article 6—Seniority

Newly hired employees will be considered to have probationary status for the first thirty (30) working days. During that time these employees may be terminated for whatever reason, by the Company, and the terminated employee shall have no recourse through the grievance and arbitration process.

Article 8—Grievance and Arbitration

Purpose and Scope

1. It is the purpose of this Article to provide the procedure for the prompt and equitable adjustment of grievances. The procedure is available to either the Company or the Union.

2. "Grievance," as used in this Agreement, means a matter to be processed as hereinafter set forth, which involves the interpretation or application of or the compliance with the provisions of this Agreement.

General Provisions

e) . . . Company grievances shall be filed by the Unit Manager in like manner and form, and shall be presented by the unit Manager to the unit President in Step 2 of the Grievance Procedure.

Step 2—Unit Level

. . . [T]he Unit Manager may introduce a Company grievance in Step 2 by presenting it to the Unit President

³ An unfair labor practice charge relating to Cadoret's discharge was pending at that time.

⁴ Aside from the obvious gustatory insult involved in placing American cheese on chicken parmigiana, the record shows that Respondent received free supplies of mozzarella through a commodity program while it had to pay for the American cheese.

for consideration within five (5) working days after the event.

Step 3 – Area Level

If a satisfactory settlement of a grievance has not been made in Step 2, . . . the Area Personnel Representative of the Company may appeal a Company matter to the local representative of the Union. . . .

Step 4 – Arbitration

If a satisfactory settlement of a grievance is not made in Step 3, an appeal may be taken by either party to arbitration under the labor arbitration rules of the American Arbitration Association. . . .

. . . In the case of a discharge, the arbitrator shall have the power to sustain the discharge or to order reinstatement of the employee, with or without pay for days lost.

Echenthal testified that under this contract, employees were not dismissed after three reprimands. He claimed that when Aramark wanted to discipline an employee, the Company itself would file a grievance and if it was not resolved the employee could be discharged and the Union could take the case to arbitration.

Echenthal stated that he had not been given any notice of the reprimands issued to Paulson prior to her discharge. He tried to call Bigley to discuss the discharge. On April 1, 1996, he sent Bigley a letter asking that Respondent meet to negotiate a number of unilateral changes in terms and conditions of employment including the termination of Melissa Paulson. On April 8, Echenthal filed an unfair labor practice charge alleging, *inter alia*, that Respondent refused to bargain when it discharged Paulson. As discussed above, Respondent did not meet with the Union between February 13 and December 13, 1996, because it objected to the presence of Cadoret on the negotiating committee.

E. Discussion and Conclusions

It is clear that Respondent is a successor to Aramark and it is evident that Respondent expressed its intention of hiring all of Aramark's employees in the Peekskill School District. Respondent's brief here acknowledges that it is obligated to recognize and bargain with the Union pursuant to *NLRB v. Burns Security Services*, 406 U.S. 272, 294–295 (1972). A *Burns* successor may not make unilateral changes in the employees' terms and conditions of employment without negotiating with their representative. However, Respondent relies on *Spruce Up Corp.*, 209 NLRB 194 (1974), *enfd.* 529 F.2d 516 (4th Cir. 1975), to argue that it permissibly offered employment to the former Aramark employees on new terms which it announced prior to or simultaneously with the offer of employment.

Respondent urges that because its handbook was included in the bid documents submitted to the School District and because it gave out the handbook when it hired the employees, it clearly signalled its intention of offering employment to the food service workers pursuant to the terms of the handbook. Respondent asserts that Bigley gave Echenthal notice that Respondent was distributing the handbook to the employees when they were hired.

Echenthal denies that Bigley mentioned the handbook and he denies that it was distributed at the meeting when the employees were hired. Paulson also denies that she was given the handbook prior to filling out the forms necessary to accept employment with Respondent.

The recollections of some of the witnesses here are less than totally accurate. Bigley did not recall that he mentioned the handbook to Echenthal at their meeting prior to hiring the unit employees until he was prodded by a leading question posed by counsel for Respondent. The fact that Bigley required a leading question to bring out one of the major facts of Respondent's case leads me to have grave concerns about the accuracy of the testimony. Laffert testified that the handbook was given out when he hired employees, but he also acknowledged that he was not present when Paulson signed the three-page document referred to by Bigley as the "rules and regulations." Further, Paulson signed the documents on August 15 and Laffert said he hired employees in September. Thus, I do not find that I can rely on Laffert's testimony about what was given to Paulson or to other employees. I do not credit the testimony of Trent Allen; although he testified about an orientation meeting, his manner of testifying did not convince me that he was able to distinguish the Peekskill meeting from other orientation sessions that he has attended. In summary, I am not convinced that Respondent's witnesses have an accurate recollection of distributing the handbook.

Echenthal initially testified that his lunch with Bigley and the subsequent employee meeting took place in August, although the events actually occurred on July 27, 1995. This is a minor point, and I find that in its totality Echenthal's recollection is more detailed and accurate than that of Respondent's witnesses. Significantly, Echenthal recalled that at the orientation meeting Respondent had handed out a document requiring employees to consent to a criminal background check and that he had obtained Respondent's withdrawal of this document. I credit Echenthal that at the orientation meeting he examined all of the documents given to the employees and that the handbook was not among the items distributed to employees. My conclusion is strengthened by the fact that Respondent required employees to sign for the three-page rules and regulations and maintained a signed copy in each employee's personnel file. Respondent has offered no explanation for failing to obtain a similar signed acknowledgement from employees for the purported handbook distribution. It is likely that if Respondent had indeed given out a handbook and conditioned employment upon the acceptance of its provisions, then Respondent would have similarly maintained a receipt for the handbook in the employees' personnel files. Moreover, Paulson, who had a good recollection and impressed me as a witness who testified accurately and without reservation, stated that she did not see the handbook until long after she was hired when she was asked to distribute a copy to each member of her crew. Respondent has not explained why it would distribute the identical handbook a second time in February when it had supposedly given each employee a copy of the handbook in the preceding July or August.

The fact that Respondent was required to submit a copy of its handbook with its bid to the Peekskill School District is not dispositive of the issue whether employees were on notice that they were being hired subject to the conditions expressed in the handbook. The same bid documents required Respondent to be "fully knowledgeable of the requirements of the agreement with the Civil Service Employees Association Inc. Local 1000 that is included in this bid." Just as the bid documents cannot be read as imposing a duty on Respondent to comply with all the terms of the Aramark-CSEA contract, they cannot be read as imposing the conditions stated in the handbook on the unit employees who were hired by the successful bidder. Nothing

in the language of the bid documents gives notice that Respondent's handbook would be binding on the unit employees. The employees and the Union would not have known that acceptance of all the different terms and conditions set forth in the handbook was a condition of employment with Respondent unless that fact was brought to their attention. I find, based on the credited testimony, that the record shows that the only change in terms and conditions announced when Respondent hired the food service workers was contained in the three-page rules and regulations document which the employees signed when they filled out the other employment forms.

I find that Laffert's written statement that he was discharging Paulson because she had received three written reprimands shows that Respondent was imposing the three-strikes-and-out provision stated in its handbook. The written and testimonial record establishes that Laffert viewed the three-strikes-and-out provision of the handbook as mandatory in Paulson's situation. It is undisputed that the conditions of employment which obtained prior to Respondent's takeover did not include any three-strikes-and-out rule. Rather, the uncontradicted testimony shows that when the former employer wished to impose discipline it used the grievance procedure. Nothing in the three-page document which Respondent required employees to sign at the orientation meeting alerted them or the Union to a three-strikes-and-out policy. Thus, the employees and the Union were justified in believing that no such change in conditions of employment as an automatic discharge after three written reprimands could be imposed on the unit employees by Respondent unless it negotiated that change with the Union.

Respondent invokes the management-rights clause of the CSEA-Aramark collective-bargaining agreement as giving it the right to make unilateral changes in the disciplinary procedures for the unit employees. Respondent argues that Aramark would have had "the right to make unilateral changes in [its] discipline programs" and that the Union had waived its right to bargain over employee discipline and negotiation. This argument is beside the point. What the employees were entitled to here was to continue in the terms and conditions of employment under which they were initially hired by Respondent until Respondent negotiated changes with the Union. Even if the Union had waived the employees' statutory rights in a contract with a former employer, the Union did not clearly and unmistakably waive the right to bargain with this employer.⁵ As set forth above, Bigley told Echenthal that Respondent was not bound to the Aramark collective-bargaining agreement. The Board said in *Holiday Inn of Victorville*, 284 NLRB 916 (1987), "a successor employer, having chosen not to adopt the contract, cannot as a general proposition rely on the management-rights clause to promulgate new rules unilaterally without affording the union an opportunity to bargain."

It is well established that the institution or alteration of a disciplinary procedure is a mandatory subject of bargaining. I find that Respondent unilaterally imposed a three-strike-and-out disciplinary policy on the unit employees, that it discharged Paulson pursuant to that policy and that Respondent thereby violated Section 8(a)(5) and (1) of the Act. *Boland Marine &*

Mfg. Co., 225 NLRB 824, enfd. 562 F.2d 1259 (5th Cir. 1977). Respondent did not present any evidence that it had disciplined or discharged employees in the Peekskill School District for conduct similar to Paulson's before its imposition on Paulson of the three strike and out policy. Indeed, the three-page listing of employee rules which Paulson signed did not give any hint that failings of the type for which Paulson was reprimanded would lead to dismissal. Nor did the written reprimands themselves warn her that she would be fired after the third reprimand. Thus, I conclude that Respondent has not shown that it would have discharged Paulson without regard to the unilaterally implemented policy and Respondent is therefore obliged to undertake the usual reinstatement and backpay remedy.

Although both the General Counsel and the Charging Party have requested in their briefs that I order Respondent to withdraw the handbook, I do not believe that such relief is appropriate. The evidence before me shows only that Respondent enforced the three strike and out policy, which is called a "three step process" in the handbook. There is no evidence that Respondent used the handbook to change other initial conditions of employment prevailing in the unit. Furthermore, the record shows that a new collective-bargaining agreement was agreed to on December 13, 1996, and signed on March 31, 1997. The testimony shows that the handbook was not a subject of controversy during the negotiations between Respondent and the Union. Thus, the parties to the contract have themselves agreed on new terms and conditions, and an order relating to the handbook would amount to unnecessary meddling in the bargain already concluded between the Union and Respondent.

It is undisputed that Bigley refused to negotiate with the Union on February 13, 1996, when he saw that the Local 1000 president was part of the union negotiating committee. The sole reason for Bigley's refusal was that she had been discharged. I credit Richardson that he told Bigley to negotiate, informing him that it was the Union's right to choose its own negotiating team. I credit Richardson that after February 13 he tried to persuade Bigley and Doherty that Respondent should negotiate with the Union. I credit Richardson that he offered to change the composition of the committee. I credit Richardson that he never agreed to suspend the negotiations. Bigley himself admitted that there was no explicit agreement to suspend negotiations but that he "interpreted" a conversation with Richardson to mean that the Union was content to let the NLRB decide whether Cadoret could be on the negotiating team. It has long been established that a Union has the right to select its own negotiating committee. Beyond its bare assertion, Respondent offered not one scintilla of evidence to show that Cadoret was an improper or disruptive member of the Union's negotiating team. To prevail on this ground Respondent would have had to meet a very high burden indeed. As Judge Feinberg said in *General Electric Co. v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969). "There have been exceptions to the general rule that either side can choose its bargaining representatives freely, but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical." I find that Respondent refused to bargain with the Union between February 13 and December 13, 1996, in violation of Section 8(a)(5) and (1) of the Act.

⁵ Moreover, *NLRB v. United Technologies Corp.*, 884 F.2d 1569 (2d Cir. 1989), cited by Respondent, does not support its argument. The management-rights clause in that case contained language giving the company the sole right to make and apply rules for discipline, a right which is not expressed in the Aramark contract. 884 F.2d at 1574-1576.

CONCLUSION OF LAW

By unilaterally implementing a new disciplinary policy and discharging Melissa Paulson pursuant to that policy, Respondent violated Section 8(a)(5) and (1) of the Act.

By refusing to bargain with the Union from February 13 to December 13, 1996, Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discharged Melissa Paulson pursuant to its unlawfully adopted disciplinary policy, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Quality Food Management, Inc., Latham, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and thereafter enforcing disciplinary policies governing employees represented by the Civil Service Employees' Association, Inc., and using the new policies to discharge employees without bargaining with the Union.

(b) Refusing to bargain collectively with the Union because any member of the union bargaining committee who is present is not an employee of the Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Cancel, withdraw, and rescind the unilaterally promulgated disciplinary policies used to discharge employees represented by the Union.

(b) Within 14 days from the date of this Order, offer Melissa Paulson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Melissa Paulson whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in the Peekskill School District copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate and enforce new disciplinary policies governing employees represented by the Civil Service Employees' Association, Inc., Local 1000, AFSCME, AFL-CIO without bargaining with the Union and WE WILL NOT use the new policies to discharge employees.

WE WILL NOT refuse to bargain collectively with the Union because any member of the union bargaining committee who is present is not a current employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL cancel, withdraw and rescind the unilaterally promulgated disciplinary policies used to discharge employees represented by the Union.

WE WILL, within 14 days from the date of the Board's Order, offer Melissa Paulson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Melissa Paulson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Melissa Paulson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

QUALITY FOOD MANAGEMENT, INC.